United States Court of Appeals for the Eighth Circuit

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No. 15276

Criminal

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JOHN P. KAMPMEYER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA, CENTRAL DIVISION
Hon. Wm. F. Riley, District Judge

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PETITION FOR REHEARING

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The appellant above named petitions this Honorable Court for a rehearing of the appeal in the above entitled cause and in support of this petition, represents to the Court as follows:

Appellant reserves his argued position as to each of the points of appeal, but in this petition addresses himself solely to those features of the decision wherein it is believed that the Court may be convinced its result is based upon the application of incorrect legal principles and the oversight of controlling facts.

Therefore, this petition is directed to the Court's determination of the first, second and fifth points put to it upon appeal in appellant's principal brief. We shall discuss the admissibility of Exhibit 14 and the other challenged exhibits in one division and the issues surrounding the instructions in a second division.

1. As to the admissibility of the Revenue Agents' net worth summary, Exhibit 14, and the other challenged Exhibits.

The keystone of proof by the net worth method is the accuracy of the figures representing the defendant's net worth at the beginning of the indictment period (in this case, January 1, 1947), "as the correctness of the results depends entirely upon the inclusion in this sum of all the assets on hand at the outset".[1] The Government cannot succeed "without proof, that assets on hand *at the beginning of the prosecution period* did not account for the net worth increases".[2]

The Court excuses the admitted failure of the Government Agents to inquire of the appellant as to how much currency he had in his safe and deposit boxes on December 31, 1946 (R. 53), on the ground that he should have volunteered the information. We submit that this overlooks the realities of an Internal Revenue investigation. A taxpayer cannot know, unless told, the purpose and extent of an Internal Revenue inquiry. He can only answer such questions as are propounded to him and assume the Government has all other relevant information it deems necessary for its purposes. It cannot be the taxpayer's burden to pry into the Agent's files to supply

1 **Holland v. U. S.**, 348 U. S. 121, 132.

2 **Smith v. U. S.**, 348 U. S. 147, 155.

deficiencies or correct errors, yet the Court's opinion appears to hold that if a taxpayer is interrogated as to a specific transaction or date, he must tender unrequested answers to unstated questions concerning every other conceivable date and transaction (even years later) at the peril that such information might upon an Agent's subsequent reflection prove material to a civil or criminal action, in which event he will be considered to have remained silent when he should have spoken.

The focus on December 31, 1939, was not a diversionary tactic of the appellant. This date was selected by the Revenue Agents upon their own counsel and determination. Appellant was unaware of what years, if any, were to be involved in a criminal prosecution. In fact, the Agents themselves were neither certain nor in agreement among themselves in this regard, until just before the indictment (R. 8, 46).

Appellant's affidavit, Exhibit 42, was *prepared by the Revenue Agents* after oral interrogations and submitted for appellant's approval and signature. The affidavit contained only such specific items of information as the Agents wanted, although it is conceded that appellant cooperatively responded to all interrogations. That this affidavit contained no declaration with respect to transactions or financial information relating to his net worth on January 1, 1947, resulted simply from the fact that the Agents did not request such information and not because appellant "stood silent." The intent and meaning of the Holland decision is misconstrued if it is cited as authority that the taxpayer must volunteer "leads" willy nilly in the hope that some might be relevant to an inquiry as to whose scope or direction he is completely in the dark. Such a holding would require the defendant to assume the initiative and responsibility for the investi-

gation, since the Agents, by refraining from inquiry, could transfer the burden to the defendant to come forward with evidence and leads at the pain that his failure would be deemed "silence at his peril." How he would divine what information the Agents wanted or what year or years were under review, is not suggested.

The Court has completely overlooked the very "relevant lead" which appellant gave to the Agents concerning his interest in the C. B. Warden Syndicate (R. 6), which on January 1, 1947, was a going enterprise (R. 57). The taxable profits of this partnership amounted to almost $100,000.00 for the calendar year 1946 (Exhibit 12), and required a bank roll for operations of as much as $30,000.00. No inquiry was made by the Agents as to when the 1946 profits were actually distributed (although under Internal Revenue Laws, appellant was required to include in his individual return, which he did, his share of these profits regardless of the time in which they were actually received by him), or how much operating capital the partnership had on hand on January 1, 1947. The Agent admitted that he assumed that appellant had withdrawn his original investment in 1944 (R. 47), and for that reason he did not include appellant's interest in the partnership as of December 31, 1946. The Court has quoted the rule (R. 9) that "it is the Court's function to decide whether evidence is competent to justify certain inferences."[3]

The evidence in this record cannot support the inference that appellant had no further financial interest in the Warden partnership even if he withdrew his original investment in 1944. On the contrary, both the Agents and other Government witnesses testified to appellant's

3 **U. S. v. Valenti**, 134 Fed. 2d 362, 364.

continued membership in the partnership, which produced substantial profits in 1945, 1946 and 1947, as shown by the Government's Exhibits 11, 12 and 13. The only other basis of justifying the omission of appellant's interest in the Warden partnership as of December 31, 1946, would be to find that at 11:59 P. M. on the last day of 1946 the partnership distributed all of its assets, including operating funds and profits, and at 12:01 A. M. on January 1, 1947, the partners reinvested the required operating funds. There is no evidence in the record competent to justify such an inference, and no one has even suggested its possibility.

The other omissions from the Government's net worth tabulation at the beginning of the prosecution period of the undeposited cash from which two cashier's checks aggregating $11,500.00 were acquired in January of 1947, the approximately $30,000.00 in undeposited cash which is reflected in the financial statement given to the bank in August of 1946 when compared with appellant's actual bank balances, and the positive testimony of the President of the bank that the appellant had in the summer of 1945 exchanged large bills of currency for bills of smaller denominations, are condoned in the opinion (R. 16) for the reason: "These, however, all had to do with the situation subsequent to 1940."

It is precisely because they had to do with the situation subsequent to 1940, that they gain in pertinence (and the more recent, the more material), since January 1, 1947, is the pivotal date and not January 1, 1940. We submit that because the Court has overlooked the significant date, its conclusions with respect to the challenged exhibits and instructions, are in error.

The ascertainment of the appellant's wealth at any antecedent time, no matter how precisely determined, is not and cannot be a substitute for the establishment with reasonable accuracy of his net worth at the beginning of the prosecution period. In fact, the statistics of the prior date would be wholly immaterial unless the Government could show that a status of no undeposited currency, having been established as to the earlier date, necessarily, from evidence reasonably justifying the inference, continued to the outset of the indictment years.

Recognizing that all reasonable inferences and intendments from the evidence supporting the verdict must be considered as established facts on appeal, we, nevertheless, urge upon the Court that there have been overlooked certain undisputed testimony which destroys any inference that the claimed no-cash position of January 1, 1940, continued without change to January 1, 1947.

Had the Government taken the view that appellant's tax returns for the seven years prior to 1947 were the limit of his income during that period, then it could have reasonably been inferred that if appellant had no undeposited currency on January 1, 1940, his income was insufficient in the light of his disbursements to accumulate and have on hand undeposited cash on January 1, 1947. But the prosecution has produced evidence and strenuously insists that during the pre-indictment years after January 1, 1940, appellant continuously had substantial funds beyond his reported income. There is nothing in the record upon which an inference can be erected that all such funds were invested in recorded assets within the calendar year received. No such presumption arises at law or in human experience.

The Court has found that the Government sufficiently negated the existence of a cash hoard on December 31, 1939, by showing that the appellant had surrendered or borrowed on his life insurance policies, liquidated his small holding of stock, drew upon his wife's postal savings and bank accounts, made small bank loans, and borrowed more than half of the purchase price of the farm, and otherwise conducted himself inconsistently with the possession of substantial sums of currency. But none of these or similar considerations obtained as of later years. On the contrary, during the pre-indictment years, subsequent to January 1, 1940, according to the Agents' figures, appellant acquired, *without mortgages or sacrifice of savings accounts or securities*, more than $140,000.00 in recorded assets, including several pieces of real estate, bonds, securities, race horses, jewlery and furs—conduct which is in no wise inconsistent with the possession of undeposited cash on January 1, 1947. This is not a matter of credibility or weight of evidence, but we are faced here with a complete absence of evidence competent to predicate an inference of no undeposited cash on January 1, 1947.

By the same token, Exhibit 14 was corrupted by including therein the amount of income reported by appellant from 1940 to 1946, since it is admitted that these figures were not in aid of the net worth computation and had no relationship, statistically, to the negation of undeposited cash or the amount of income that should have been reported in 1947 and 1948. This is not a case like those cited by the Court in which prior year's returns were used for the purpose of negating accumulations during those years which might have been available for investment during the prosecution years.

It may be that the record contains sufficient evidence to justify the inference that appellant did not have $90,000.00 in cash on December 31, 1939. It is also true, however, that the drawing of this inference was not the free and independent act of the jury under proper instructions. The Revenue Agent whom the Court frequently characterized as qualified and expert, was permitted on direct examination to invade the province of the jury and usurp its funcion as to that determination, over the timely objection of the appellant (R. 39). We believe this Court has overlooked the impact and influence of the grossly improper "expert conclusion" of Sklenicka, who was allowed to declare (R. 39) ". . . and I also concluded that the net worth which he shows in his credit statement of June 4, 1940, was all he could have possibly had on that date in the light of the information that I had in regard to his financial history and his tax returns and so forth."

2. As to the giving and refusing of certain instructions.

We submit that the Court has overlooked the imperatives of the Holland decision with respect to the importance of clear anl lucid charges that shall fully acquaint the jury with the nature of a net worth prosecution. The Supreme Court did not treat this matter as one of technical formalities which the trial Court should observe only when precisely directed to do so by the accused. Rather, by emphatic and repeated admonitions, the Supreme Court commanded the trial and appellate Courts to make certain that the "charges should be especially clear, including in addition to the formal instructions, a summary of the nature of the net worth method,

the assumptions on which it rests, and the inferences available both for and against the accused.'"[4]

It appears that this Court has considered our arguments and authorities that the defendant's objections to Instruction 13, particularly in the light of his requested Instruction Number 7, are precise enough to preserve the claimed errors for appeal. This topic was covered in our principal brief and in our reply brief. We do not believe, however, that the Court has weighed the point we advanced that even assuming that appellant's objections were technically insufficient, the nature of the errors was such as to require recognition of them by the Appellate Court, not only under the Holland and companion cases, but under Rule 52-b of the Federal Rules of Criminal Procedure.

Only recently the 9th Circuit reviewed a conviction for tax evasion in *Bloch v. U. S.*, 221 Fed. 2d 786. In that case the Court observed that appellant made no objection to the instructions given by the trial Court and did not raise in the Appellate Court, any question regarding the correctness of the trial Court's charge. Nonetheless, the Circuit Court felt impelled upon its own volition, to consider the error under the mandate of Rule 52-b above. The trial Court in the Bloch case had undertaken to instruct the jury on the issues of willfulness and after appropriate language defining willfulness in general, the Court charged that a person is presumed to intend the natural consequences of his acts and if he intentionally did not set up his income and thereby the Government was cheated of taxes, that he intended to defeat the tax. The Court reversed, saying that the error of the trial Court was so fundamental—going to the very essence of the case, that the reviewing Court must take notice of it.

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4 **Holland v. U. S.**, 348 U. S. 121, 129.

We submit that the instruction which was struck down by the 9th Circuit upon its own notice embraces an error that is no more fundamental or essential than the erroneous instructions complained of in the instant appeal. We submit that the trial Court's declaration to the jury that an excess increase in net worth over a period of nine years (of which only two are charged in the indictment), signifies that there must be a discrepancy in tax payments, is so manifestly erroneous, so completely at variance with the applicable law, as to deprive the appellant of his fundamental and essential rights. In the same degree, that portion of the charge which attempts to validate the conclusions of Exhibit 14, if the jury shall find that appellant did not have $90,000.00 in currency on January 1, 1940, removed from the consideration of the jury, all of the testimony, even that provided by the Government which tended to show that Exhibit 14 did not include all of appellant's assets at the beginning of the prosecution years. It is difficult to conceive an error that relates more to the essence of a net worth prosecution than that comprehended by this erroneous instruction.

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CONCLUSION

It is difficult for an advocate to maintain an objective perspective of his client's cause. Yet, we believe that the issues raised by this petition can only be resolved favorably to the appellant under the principles of Law which make up our very heritage of American liberty and justice. The business of gambling is of base estate in 47 of our 48 states, but men accused of more heinous activities have been accorded the full measure of the Law's protection when they stand before the bar of justice. We trust that this Court upon further consid-

eration, will grant a rehearing, so that the appellant may be fairly tried for the offenses charged.

Respectfully submitted,

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Attorneys for Appellant.

CERTIFICATE OF COUNSEL

We hereby certify in compliance with Rule 15-b of this Court that this petition is filed in good faith and is believed to be meritorious.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 608 Misc.

JOHN P. KAMPMEYER, PETITIONER

v.

UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO FILE A PETITION FOR A COMMON LAW WRIT OF CERTIORARI AND PETITION FOR A COMMON LAW WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO THE GRANTING OF THE MOTION

1. Petitioner's conviction on two counts of income tax evasion under Section 145 (b) of the Internal Revenue Code of 1939 was affirmed by the Court of Appeals on November 22, 1955. On December 19, 1955, that court denied a petition for rehearing. A petition for a common law writ of certiorari was filed in this Court on March 3, 1956. No application for an order extending the time for filing a petition for certiorari was made.

2. Failure to file a petition for a writ of certiorari under 28 U. S. C. 1254 (1) within the thirty-day time limit prescribed by Rule 22 of this Court's Rules is sought to be justified by petitioner on the ground that the Government has filed liens against his assets, pending disposition of his civil tax liabilities, and that he therefore was unable to obtain the services of a "suitable attorney" until after the expiration of the thirty-day period for filing the petition (Pet. 2, 3).[1] No reason is given for failure to seek leave to proceed *in forma pauperis*, or to apply for an extension of time under Rule 22 (2).[2]

3. Petitioner invokes the jurisdiction of this Court under the "all writs" section of the Judicial Code, 28 U. S. C. 1651 (a). The traditional use of the common law writ of certiorari has been as an auxiliary process to correct diminution of the record (cf. Rule 32), and, in cases of imperative necessity, as a means of correct-

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[1] Petitioner also asserts (Pet. 2, 3) that the sentence was unduly harsh. We are advised by the United States Attorney that on March 5, 1956, the trial judge, on petitioner's motion, reduced the total fine from $14,000 to $10,000 and made the prison sentences concurrent rather than consecutive, and that the fine was paid in full on March 8, 1956.

[2] It may be noted that the attorney who filed the motion and petition in this Court represented petitioner during the Government's investigation and at the trial (R. 3, 25).

ing excesses of jurisdiction and furthering justice in other kindred ways. It may not be used as a substitute for the statutory writ of certiorari to review alleged errors committed in the exercise of a lawful jurisdiction. *United States* v. *Beatty,* 232 U. S. 463, 467–468; *United States* v. *Dickinson,* 213 U. S. 92, 102; *Whitney* v. *Dick,* 202 U. S. 132, 137–141; *In re Chetwood,* 155 U. S. 443, 461–462; *American Construction Co.* v. *Jacksonville Railway,* 148 U. S. 372, 379–380; cf. *United States Alkali Assn.* v. *United States,* 325 U. S. 196, 203; *Ex parte Vallandigham,* 1 Wall. 243, 249–251; *Ex parte Gordon,* 1 Black 503. And see *Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States* (Wolfson and Kurland ed., 1951), Section 309, pp. 582–587.

4. Petitioner does not attack the jurisdiction of the courts below, and it is plain that he seeks the common law writ of certiorari under 28 U. S. C. 1651 (a) only as a substitute for the writ of certiorari under 28 U. S. C. 1254 (1), for which he failed to apply within the applicable time.

Accordingly, it is respectfully submitted that the motion for leave to file a petition for a common law writ of certiorari should be denied.[3]

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Solicitor General.
CHARLES K. RICE,
Acting Assistant Attorney General.
JOSEPH M. HOWARD,
RICHARD B. BUHRMAN,
Attorneys.

MARCH, 1956.

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[3] If the motion should be granted, the Government respectfully requests an opportunity to file a brief in opposition to the petition.

U. S. GOVERNMENT PRINTING OFFICE: 1956